

Human Services Board, Lila Shapero, Dena Monahan, and Mark Schneider

Daniel Jerman, Hearing Officer

October 26, 1995

Jessica Sears, Fair Hearing No. 13,279

INTRODUCTION

The petitioner appeals the decision by the Department of Aging and Disabilities (DAD) terminating her receipt of funding from the Participant Directed Attendant Care (PDAC) program and denying her request for increased funding under that program. The issue is whether DAD properly evaluated the petitioner's attendant care service needs within the meaning of the pertinent statutes and regulations.

PROPOSED FINDINGS OF FACT

The petitioner is a twenty-one-year-old woman who has cerebral palsy with spastic quadroparesis. She is wheelchair bound and requires 24-hour care and assistance. She also suffers from urinary incontinence and vision tracking problems.

The petitioner lives in her parents' home. She requires assistance in virtually all physical aspects of daily living, including getting in and out of bed, toileting, bathing, dressing, grooming, and meal preparation.

In 1993, DAD found the petitioner eligible to receive PDAC services under the Attendant Services Program. At the time, DAD determined that the petitioner needed 94 hours of attendant care on a bi-weekly basis. Because the petitioner was already receiving 60 hours of such services under the Medicaid Waiver program⁽¹⁾, she was granted funding for 34 hours bi-weekly of PDAC services--the difference between her need and what was covered under the medicaid waiver program.⁽²⁾

In June, 1994, the petitioner requested additional hours of PDAC funding based on an alleged service need of 267 hours bi-weekly. Because the petitioner's request far exceeded the amounts generally authorized by DAD's "eligibility committee" (see *infra*), DAD arranged to have the petitioner admitted to the Orthopedics and Rehabilitation unit of Fletcher Allen Health Care to undergo a complete evaluation of her attendant care needs. The petitioner and her family agreed to this evaluation. It appears that the petitioner was the first, and remains the only, PDAC program applicant to date to have been asked by DAD to undergo such an evaluation.

The petitioner's evaluation lasted two days and was conducted by trained specialists under the supervision of a nationally-known expert in rehabilitation medicine. At the conclusion of the evaluation the petitioner and her mother met with the evaluators to prepare a "service needs request form" provided by DAD. The petitioner, her mother, and the evaluators signed the form; and it was the opinion of the evaluators that the parties to the meeting had reached a consensus that the petitioner's service needs were as specified on the form.

DAD's service need request form lists nineteen separate aspects of personal care and maintenance needs that correspond closely (but not exactly, see *infra*) to "services" listed in the program regulations. On the form the applicant is asked to describe the services she requires and to give the time required to provide them on a daily basis. The form submitted by the petitioner's evaluation team requested a total of 8 hours a day, or 112 hours bi-weekly, of attendant care services.

DAD's eligibility committee is comprised of individuals appointed by the Commissioner who, through their own disabilities or work in this field, are deemed to have expertise in assessing specific service needs of applicants to the attendant services program. Usually, a "quorum" of three committee members meets on an ad hoc basis to make individual eligibility determinations.

In the petitioner's case, three members of the eligibility committee met on October 3, 1994 to review the petitioner's service request form. Neither the petitioner, her family, nor any member of the evaluation team that filled out the form was present during the committee's review. The committee approved the amounts of time requested for nine of the service needs listed on the evaluation team's application. The committee allowed a slight increase in time (8 minutes a day) for one item. However, the committee significantly reduced the requested time in four areas of requested need and denied any time at all for two other needs described on the petitioner's application. This resulted in the committee approving a total of 5 1/2 hours a day (or 77 hours bi-weekly) compared to the 8 hours a day (112 hours bi-weekly) the evaluation team had requested. Because the petitioner was then receiving 80 hours bi-weekly of medicaid waiver funds to cover these services (three hours in excess of what the committee had approved), DAD determined that the petitioner was ineligible for any PDAC funding for attendant care services.⁽³⁾

The hearing in this matter was held on February 8 and March 15, 1995. At the hearing the petitioner contested not only DAD's decision reducing her hours from those recommended by the evaluation team, but also argued that the evaluation team's conclusions underrepresented the extent of her service needs. Testimony was taken from three members of the petitioner's evaluation team (including the medical director), the petitioner's parents, one of the petitioner's caregivers, and two of the members of the DAD eligibility committee that reviewed the petitioner's request, one of whom is the director of the DAD attendant care services program. The petitioner, herself, was unable to handle the stress of testifying at the hearing. After the hearing was concluded, the parties attempted to make arrangements for her testimony to be submitted in deposition form. On September 15, 1995, the petitioner's attorney submitted a transcript of a deposition of the petitioner by her attorney and the petitioner's responses to written interrogatories posed by the attorney for DAD.⁽⁴⁾ Both parties submitted legal memoranda and additional written documentation.⁽⁵⁾

The primary factual issue in the matter is the determination of the amount of hours of attendant care services that are reasonably necessary to assist the petitioner in maintaining her independence. The petitioner has requested funding for 267 hours of services bi-weekly. The rehabilitation team evaluation called for 112 hours. The DAD eligibility committee determined that only 77 hours could be approved. Evidence was presented at the hearing purporting to justify all three assessments.

The hearing officer was most convinced by the evidence supporting the assessment of the rehabilitation evaluation team. The team was comprised of well-trained, experienced, and highly regarded professionals. The team spent two full days with the petitioner in a clinical setting participating in and evaluating virtually every aspect of her personal care. It relied heavily on information provided by the petitioner, her parents, and her doctors regarding her medical and personal circumstances. The service request prepared by the team (on a DAD form) represented the consensus of the professional judgement of the team members.

Although the petitioner and her mother dispute that they ever agreed with the team's evaluation, they participated in the team's evaluation meeting, signed the service request, and left the rest of the team members with the impression that they agreed with the team's conclusions. The evidence presented by the petitioner was not deemed sufficient by the hearing officer to specifically contradict any of the evaluation team's conclusions. Certainly in terms of achieving an ideal or maximum amount of independence for the petitioner, any increase in the amount of attendant care services available to her would be of substantial benefit in terms of comfort, safety, and lifestyle. However, it is concluded that the evidence presented in this matter amply supports the evaluation team's assessment of the level of service reasonably necessary to allow the petitioner to maintain her present level of independence.

The next question is whether the conclusions of the DAD eligibility committee, which lowered or eliminated several of the evaluation team's findings, are supported by the evidence. It is found in each case that they are not.

As noted above, the eligibility committee approved the amount of time requested by the evaluation team in nine areas. Those areas were: bathing (15 min./day), dressing (30 min./day), grooming (10 min./day), hair/skin care (15 min./day), toileting (30 min./day), ambulation/ROM (20 min./day), transportation/escort (20 min./day), shopping (17 min./day), and assistance with medication (1 min./day). As also noted above, ample evidence supports the evaluation team's--and, therefore, the committee's--conclusions in these areas.

The committee reduced the time requested by the evaluation team in the following four areas: transferring (80 min./day requested--60 min./day approved), household maintenance (43 min./day requested--9 min./day approved), cleaning/laundry (69 min./day requested--35 min./day approved), and equipment maintenance (10 min./day requested--5 min./day approved). The committee members who testified at the hearing stated that the committee reduced the requested hours in the above areas based on the committee's "collective experience" and applying the program norms and maximums contained in its "guidelines". Nothing in the evidence submitted by DAD establishes, however, that the committee considered any factors particular to the petitioner that weighed against the conclusions of the expert evaluators that the committee, itself, had selected to review the petitioner's requests.

At the outset of the process the committee appeared to recognize that it would be necessary to obtain information that was directly related to the petitioner's particular needs. This seems to be an admission on the committee's part that the conventional standards of collective wisdom and program guidelines were insufficient in evaluating the petitioner's request. Once this specific information was obtained about the petitioner--in the form of the evaluation team's requests--it therefore seems particularly arbitrary, if not inexplicable, for the committee to have returned to the vague standards of collective wisdom and program guidelines to modify or reject the evaluation team's findings. Based on the evaluation team's assessment, and the lack of any evidence contradicting it, it cannot be found that the committee's decisions reducing the times requested by the evaluation team in the areas of transferring, household maintenance, cleaning/laundry, and equipment maintenance are supported by the evidence.

The committee rejected outright any time requested by the evaluation team in the areas of mobility guide (43 min./day) and pickups (30 min./day). The explanation offered by DAD was not that the petitioner does not actually require these services, but that mobility guide service is only allowed in cases of vision impairment and that picking up things for a client who drops them is simply not a covered service. Again, however, it is found that the evidence fully supports the evaluation team's request in these areas (see infra).

RECOMMENDATION

DAD's decision should be modified. The petitioner should be found eligible for PDAC funding for attendant care services totalling 112 hours bi-weekly (less the amount of that time covered under the medicaid waiver program).

REASONS

The attendant care services program was created by 33 V.S.A. § 6321, which provides as follows:

(a) As used in this section,

(1) "Attendant care services" means one or more of the following types of care or service provided for compensation: assistance with personal care including dressing, bathing, shaving and grooming, and assistance with eating, meal preparation and ambulation. Recipients of attendant care services shall have the opportunity to hire, train and terminate the employment of attendants as necessary, establish work schedules, manage the services and oversee payments of attendants and recordkeeping.

(2) "Group-directed attendant care" means attendant care services provided by one or more attendants to a group of unrelated individuals who reside in the same residence.

(3) "Personal services" mean attendant care services provided to an elderly or disabled Medicaid eligible individual in his or her home, which are necessary to avoid institutionalization.

(4) "Participant-directed attendant care" means attendant care services for a permanently, severely disabled individual who requires service in at least two activities of daily living in order to live independently.

(b) The department shall establish an attendant care services program to assist eligible individuals gain or retain their independence. The attendant care services program shall include a participant-directed attendant care program, a group-directed attendant care program and a personal services program.

(c) Information received or compiled by the department with respect to individuals using attendant care services shall be confidential.

(d) The commissioner shall adopt rules to implement the provisions of this section including eligibility criteria for the programs, criteria for determining service needs, rules relating to control and oversight of services by beneficiaries of a program and procedures for handling and maintaining confidential information. Prior to filing a proposed rule, the commissioner shall seek input from individuals with disabilities, the elderly and organizations which represent such individuals.

(e) Grievances brought under this section shall be heard by the human services board.

Pursuant to paragraph (d) above, DAD has promulgated regulations setting forth the scope of and eligibility for the program. Section 106 of the DAD regulations defines the creation and responsibilities of the eligibility committee, but not the criteria used by the committee in making individual eligibility determinations. Those criteria are set out in a written set of "guidelines" issued by DAD. The guidelines include a list of 18 (as opposed to 19 on the request form, see supra) "activities" for which "median" and "maximum" times are established, and the provision that: "The Committee shall require applicants and participants to justify requests for assistance service which exceed the median time for each activity."

It is not necessary in this matter to determine the validity of the DAD guidelines. (The petitioner argues that they are invalid because they were not promulgated as regulations pursuant to the Vermont Administrative Procedures Act, 3 V.S.A. §§ 801 et seq.) This is because the evidence (see supra) has been found to support the recommendation of the evaluation team, which in turn (see infra) is concluded to be within the DAD guidelines as written--notwithstanding the actions of the DAD eligibility committee.

Of the four activities for which the DAD eligibility committee reduced the time requested by the evaluation team (i.e., transferring, household maintenance, cleaning/ laundry, and equipment maintenance), all exceeded the guideline median; but only one (cleaning/laundry) exceeded the maximum. As found above, there is ample evidence to "justify" the time requested in those areas, and insufficient evidence to support the committee's reductions of the times requested by the evaluation team. Therefore, except for cleaning/laundry, which is discussed separately below, the committee's decision to reduce the times requested by the evaluation team is unsupported by either the evidence or the committee's own guidelines.

As for cleaning/laundry, the maximum under the committee's guidelines is 35 minutes a day--which is

what the committee allowed (reduced from the 68 minutes a day the evaluation team had requested). However, the request form indicates, and the evidence fully supports, that most of the cleaning and laundry required in the petitioner's care results from clothing and bedding soiled by the petitioner's incontinence. The evaluation team requested, and the committee granted, only 30 minutes a day for "toileting"--although the maximum allowable under the guidelines is 105 minutes a day. Given the petitioner's particular problems and needs, it seems eminently reasonable to allow her the additional time required for cleaning/laundry due to her incontinence under the category of toileting. The evidence supports it, and it does not violate the committee's overall guidelines. Given the overall policy of the program to "focus first and foremost on the needs... and abilities of... participants as individuals"⁽⁶⁾, it must be concluded that at least half of the time requested by the evaluation team under cleaning/laundry is allowable under toileting within the meaning and limitations of the DAD guidelines. (This still leaves the petitioner well under the guideline maximum for toileting.)

The same analysis can be used to justify the evaluation team's request for 30 minutes a day for "pickups" of items the petitioner frequently drops due to her spasticity. The committee disallowed this request in its entirety because it concluded that this is "not a category" of covered service under the guidelines. However, given the uncontroverted evidence of the petitioner's particular problems and need in this area, the committee's rationale strikes the hearing officer as unreasonably rigid and arbitrary. The evaluation team requested, and the committee allowed, 20 minutes a day under the category "ambulation around the home". The guideline maximum under this category is 80 minutes a day. It appears that had the evaluation team simply been sophisticated enough to include the time requested for "pickups" under the category of "ambulation", there would have been no question of the petitioner's "justification" of this item and the fact that it fell within the guideline maximum. Again, the evidence fully supports the petitioner's need for this service, and it is concluded to be within the guidelines to have it covered.⁽⁷⁾

The committee's rejection of the evaluation team's request (43 minutes a day) for "mobility guide" is puzzling. The guidelines allow a maximum of 60 minutes a day for this activity. The evidence in this case is uncontroverted that the petitioner has a visual "tracking problem" which poses an impediment, if not a danger,⁽⁸⁾ to her ability to navigate safely in her wheelchair. The committee explained that its decision to deny any coverage for this activity was based on its "policy" of only allowing this services in cases where there is a "visual impairment". If there is an argument to be made that the degree of one's visual impairment is determinative of whether this service is covered, it can be noted that both the regulations and the guidelines themselves are silent as to any criteria for making this determination. Nothing in the evidence submitted by DAD explained or justified the committee's denial of this service. It appears that the committee either simply ignored or arbitrarily minimized the evidence of the petitioner's visual impairment. Based on the evidence, however, it must be concluded that the petitioner clearly meets the requirements of written policy for coverage of this service.

Based on the foregoing, DAD's decision should be modified to allow the petitioner 112 hours bi-weekly of PDAC services, as recommended by the evaluation team hired by DAD to assess the petitioner's needs.

THIS MATTER WILL BE CONSIDERED BY THE BOARD AT A MEETING IN MONTPELIER ON WEDNESDAY, DECEMBER 13, 1995. THE MEETING WILL BE HELD AT THE NATIONAL LIFE INSURANCE COMPANY - NORTH BUILDING (SEE ATTACHED MAP), IN THE TRANSPORTATION/MAINTENANCE CONFERENCE ROOM, 4TH FLOOR, AND WILL BEGIN AT 9:30 A.M., ALL VISITORS ARE REQUIRED TO SIGN IN AT THE

FRONT DESK AS THEY COME INTO THE BUILDING. DIRECTIONS TO THE CONFERENCE ROOM WILL BE PROVIDED BY THE RECEPTIONIST AT THE FRONT DESK.

1. PDAC funds are available to meet service needs over and above those covered by medicaid.
2. Sometime between the date the petitioner was initially found eligible for PDAC services and the time of the events that led to this fair hearing the petitioner's medicaid waiver funding was increased from 60 to 80 hours bi-weekly.
3. During the pendency of this appeal DAD has continued to provide the petitioner with the same level of PDAC funding that she was receiving prior to her May, 1994 request for an increase. However, because of an increase in medicaid waiver funding from 60 to 80 hours bi-weekly, funding from all sources for the petitioner's attendant care has actually increased by 20 hours bi-weekly since she made the request for increased PDAC funding.
4. DAD has objected to the admission of this deposition. However, since the hearing officer has essentially adopted the findings and opinions of the evaluation team, see *infra.*, and inasmuch as the petitioner's testimony is not deemed to be contradictory to the assessment of the evaluation team, it is unnecessary to rule on the admissibility of the petitioner's deposition.
5. Copies of the parties' legal arguments and some of the documents submitted by the parties have been provided to members of the Board.
6. See "policy" preamble to DAD Attendant Services Program Regulations.
7. Although in light of the foregoing it is unnecessary for the Board to reach this issue, it should be noted that the list of services that appears in the DAD regulations, as addressed in the guidelines, is not exclusive. The regulation (§ 107) uses the words "such as" and "including" before the list of services. To the extent that the guidelines have been interpreted by the committee as limiting coverage to only those listed services, this would appear to conflict with both the plain meaning of § 107 and the policy provisions in the regulations (regarding the "focus" on "individual...needs and abilities") discussed above.
8. There is evidence that the petitioner has run into objects with her wheelchair that she has not seen, and that one time this resulted in the wheelchair tipping over.